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Dataway, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AT&T Corp.

PLAINTIFF,

v.

Dataway, Inc.

DEFENDANT.

CASE NO. C07-02440 EDL

**REPLY MEMORANDUM IN SUPPORT
OF DEFENDANT'S MOTION TO
COMPEL RESPONSE TO
DEFENDANT'S REQUEST FOR
PRODUCTION OF DOCUMENTS**

Dataway, Inc.

COUNTERCLAIMANT

v.

AT&T Corp.

COUNTERDEFENDANT

Date: May 20, 2008
Time: 9:00 am
Courtroom: E

1 Defendant/Counterplaintiff Dataway, Inc. (hereinafter "Dataway"), hereby
2 submits this Reply Memorandum in Support of its Motion to Compel a response to
3 Dataway's Request for Production served upon Plaintiff on January 17, 2008, in
4 accordance with the California Rules of Court and the Code of Civil Procedure.

5 I. INTRODUCTION

6 This is a collection action in which Plaintiff AT&T alleges that Dataway
7 incurred certain expenses for telephone calls made using AT&T services and alleges
8 further that Dataway has failed and refused to pay for said expenses. Dataway asserts that
9 the expenses alleged were the result of the unauthorized, intervening, criminal conduct of
10 third-party hackers from a remote location, and not made using the services contracted
11 for by Dataway, but charged to an account neither opened, maintained, nor authorized by
12 Dataway. Dataway has counterclaimed against Plaintiff alleging various contract
13 breaches, fraud and violation of the "anti-slamming" law, 47 U.S.C. § 258.

14 On or about January 17, 2008, Dataway served a Request for Production
15 of Documents upon Plaintiff pursuant to F.R.C.P. § 34. Plaintiff's response to the
16 Request was an identical repetition of a list of objections to each and every Request,
17 without the production of a single document or item of information, or a specific
18 objection to any request or any part of any request. It is Defendant's contention that
19 Plaintiff's response is so lacking in substance as to constitute no response at all.

20 F.R.C.P. § 34 provides that for each item or category requested, the
21 response must either state that inspection and related activities will be permitted as
22 requested or state an objection to the request, including the reasons. If an objection is
23 made, the objection to part of a request must specify the part and permit inspection of the
24 rest. If plaintiff has a valid objection to providing any of the information requested, its
25 attorneys must state with specificity the basis for the objection, the description of the
26 information or documents with respect to which inspection is denied, and nevertheless
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1 permit inspection of the rest. Plaintiff did not do this in the slightest, but merely set forth
2 a slew of non-specific objections and failed to provide any information at all.

3 It should be noted that the first 13 pages of Plaintiff's 18-page opposition
4 memorandum contain argument about the substantive merits of the complaint and the
5 counterclaims, which, on the instant Motion to Compel, are not particularly relevant or
6 illuminating. It appears to be Plaintiff's position that it will not produce any discovery
7 other than that for its case-in-chief because it believes that the counterclaims have no
8 merit. Plaintiff has already had the opportunity to have the Court hear its Motion to
9 Dismiss the Defendant's counterclaims; that motion was denied, hence Dataway is
10 entitled to conduct discovery with respect to those claims regardless of Plaintiff's
11 opinions of their validity.

12 The last 5 pages of the memorandum set forth, with some greater
13 specificity than before, and with reference to individual requests, three objections: one
14 based on attorney-client privilege and work product, one for overbreadth, and one based
15 upon an assertion that "This request cannot possibly lead to the discovery of any
16 admissible evidence." Again, Plaintiff has not identified any document in its possession
17 that is subject to non-production because of a legitimate privilege, nor has it set forth a
18 description of documents being produced and documents being withheld. In fact, the only
19 documents that Plaintiff mentions at all are "the invoices which the defense already has in
20 its possession."

21 A "party asserting a privilege must make a prima facie showing that the
22 privilege protects the information it intends to withhold," and a privilege log is one way
23 (if not the only way short of *in camera* review) to do this. Caliper Techs. Corp. v.
24 Molecular Devices Corp., 213 F.R.D. 555 (N.D. Cal. 2003), citing In re Imperial Corp. of
25 America, 174 F.R.D. 475, 477-78 (S.D. Cal. 1997) (citing In re Grand Jury Investigation,
26 974 F.2d 1068 (9th Cir. 1992)). The pertinent rules require that a party withholding
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1 relevant documents requested by its adversary identify the withheld documents and the
 2 basis for withholding them, and that he do so with sufficient specificity to permit the
 3 adversary to determine whether it wishes to challenge the privilege claim in court.
 4 Typically, a privilege log must identify each document and provide basic information,
 5 including the author, recipient, date and general nature of the document. *See, e.g., United*
 6 *States v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). Plaintiff
 7 has provided nothing of the sort.

8 Plaintiff has asserted the attorney-client privilege as a basis for its non-
 9 production. The attorney-client privilege protects: "(1) communications (2) made in
 10 confidence (3) by the client (4) in the course of seeking legal advice (5) from a lawyer in
 11 his capacity as such, and applies only (6) when invoked by the client and (7) not waived."
 12 *United States v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990). The burden of
 13 demonstrating the existence of the attorney-client privilege clearly rests on the party
 14 asserting the privilege. *Id.* at 1283. "This privilege is to be strictly construed." *United*
 15 *States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990). To properly claim attorney-client
 16 privilege, the claimant must specifically designate and describe the documents claimed to
 17 be within the scope of the privilege and to be reasonably precise in stating the reasons for
 18 preserving their confidentiality. *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir.
 19 1977). Objections made in such a general and blanket manner, as those by Plaintiff, are
 20 improper and therefore "no claim of privilege at all." *International Paper Co. v. Fireboard*
 21 *Corp.*, 63 F.R.D. 88, 94 (D. Del. 1974).

22 The following list of items has generally been held as sufficient to sustain
 23 the burden of asserting the attorney-client privilege: 1. the date of document; 2. the
 24 author; 3. the primary addressee; 4. any secondary addressee(s); persons copied and
 25 recipient (and the relationship of that person(s) to the client and/or author of
 26 the document); 5. the type of document (e.g., internal memo, letter with enclosures, draft
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1 affidavit, etc.); 6. the client (i.e., party asserting privilege); 7. the attorneys; 8. the subject
2 matter of document or privileged communication; 9. the purpose of the document or
3 privileged communication (i.e., legal claim for privilege); and 10. whether the document
4 or communication is work product or attorney-client privilege.

5 Again Plaintiff has provided no such list.

6 Next, Plaintiff asserts that the definition of "the relevant period" in the
7 Request for Production renders each request which contains a reference to "the relevant
8 period" objectionable for overbreadth. The definition of "the relevant period" is the
9 period of time beginning with the date that Defendant consolidated its telephone services
10 with Plaintiff, AT&T/SBC, December 1, 2003, to present, a total of less than 4 ½ years.
11 This is not a "fishing" expedition: the request for information is clearly predicated on
12 obtaining information about events that occurred during the limited period of the business
13 relationship between the parties. The requests tailor their scope to specific conversations,
14 events, or subjects. They are reasonably calculated to obtain admissible evidence, and
15 therefore are certainly reasonably calculated to lead to the discovery thereof.

16 Defendant does not ask Plaintiff to divulge privileged information or to
17 breach a confidential or protectible relationship; Defendant does not seek anything more
18 than that to which it is entitled under the rules governing discovery. Pursuant to F.R.C.P.
19 § 26(b) (1), Dataway is entitled to obtain discovery regarding any matter, not privileged,
20 that is relevant to the claim or defense of any party. This rule is construed very broadly,
21 encompassing "any matter that bears on, or that reasonably could lead to other matter that
22 could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v.
23 Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1987). Discovery is
24 not limited to the issues raised only in the pleadings, but rather it is designed to define
25 and clarify the issues. Id., at 351, 98 S.Ct. at 2389. This would certainly include the
26 counterclaims.

1 Finally, F.R.C.P § 37(a)(4)(A) would require Plaintiff, as the party whose
2 conduct necessitated the motion (or the party or attorney advising such conduct or both of
3 them) to pay to the moving party the reasonable expenses incurred in making the motion,
4 including attorney's fees. Plaintiff's evasive and incomplete response to the Request for
5 Production is, for the purposes of the rule, treated as a failure to respond, and so entitles
6 Dataway to the costs incurred in making this motion to compel.

7 In light of the foregoing, it is respectfully requested that Defendant's
8 Motion to Compel be granted, and that pursuant to F.R.C.P. § 37(a)(4)(A), Plaintiff be
9 ordered to pay Defendant for the expenses incurred in making this motion.

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12 Dated: May 9, 2008

MATLOCK LAW GROUP
Attorneys for Defendant/Counterplaintiff
DATAWAY, INC.

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15 By: 

16 Anne-Leith Matlock, Esq.
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